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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-8
Home Shopping Station Issues	)	

To the Commission:

OPPOSITION TO PETITION FOR RECONSIDERATION

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September 30, 1993

TABLE OF CONTENTS

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SUMMARY OF ARGUMENT

The Center for the Study of Commercialism ["CSC"] does not -- nor could it -- challenge the Commission's conclusions with respect to the three specified statutory factors. Instead, it collaterally attacks Television Deregulation.

CSC's plea for reimposition of commercial limits, however, is based solely upon a reflexive negative response to televised commercial matter rather than any reasoned analysis of its impact. Moreover, it comes in the wrong forum: a Commission inquiry will revisit issues relating to commercialization.

CSC's related claim that the format of home shopping stations' public service programming precludes a public interest finding invites the Commission to engage in clearly prohibited regulation of television stations' program formats. As such, it cannot support reconsideration.

CSC's request that the Commission consider alternative home shopping formats also would require prohibited program content regulation. Moreover, such action is unnecessary in light of the Commission's basic conclusion that home shopping stations as currently formatted can and do operate consistent with the public interest.

Contrary to CSC's assertions, the Report and Order is not tainted by ex parte communications. Many of the letters mentioned in Chairman Quello's Statement were properly in the record, and all merely reiterated arguments submitted elsewhere in the record and to which interested parties had a full opportunity to respond.

As to CSC's claims concerning consideration of Congressional statements, Section 4(g)'s legislative history is replete with numerous, often conflicting statements concerning its meaning and Congressional intent. In such circumstances, the Commission has broad interpretative discretion; CSC makes no showing that this discretion has been abused.

Finally, CSC's requested interpretation of the relationship between a home shopping format and a station's renewal expectancy is contradicted by Section 4(g)'s plain language. There is thus no reason for the Commission to alter its interpretation of this provision.

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To the Commission:

OPPOSITION TO PETITION FOR RECONSIDERATION

Silver King Communications, Inc. ["SKC"],[1/] by its attorneys, submits herewith its opposition to the petition for reconsideration of the Commission's Report and Order in the above-captioned proceeding[2/] filed by the Center for the Study of Commercialism ["CSC"].[3/]

Introduction

The Notice of Proposed Rulemaking herein[4/] implemented Congress' direction that the Commission determine whether home shopping stations are operating in

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1/ As reflected in its comments herein, SKC is the parent of the licensees of 12 television stations, all of which carry the programming of the Home Shopping Club.

2/ Report and Order, MM Docket No. 93-8, FCC 93-345 (July 19, 1993) ["Report"].

3/ 58 Fed. Reg. 48368 (September 15, 1993).

4/ Notice of Proposed Rulemaking, MM Docket No. 93-8, 8 FCC Rcd 660 (1993) ["Notice"].

compliance with the public interest, convenience and necessity so that they are entitled to mandatory cable carriage. 47 U.S.C. § 533(g) ["Section 4(g)"]. After thorough consideration of a voluminous record, in which the "overwhelming majority" of comments supported must-carry status for home shopping stations, the Commission concluded that such stations do serve the public interest and hence qualify as local commercial television stations for purposes of mandatory cable carriage.[5/]

This conclusion was supported by specific findings with respect to three factors mentioned by the statute. First, the Commission concluded that home shopping stations have significant viewership. Report at par. 6. Second, it held that competing spectrum demands are adequately resolved through the existing renewal system and the initial licensing process, finding that competing demand for spectrum used by home shopping television stations is "minimal." Id. at par. 12. Finally, the Commission concluded that "...home shopping broadcast stations play a role in providing competition for nonbroadcast services supplying similar programming." Id. at par. 23.

Additional public interest factors also supported the Commission's decision. The Commission revisited the

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5/ Report at par. 2.

assumptions supporting Television Deregulation[6/] and determined that they continue to be valid, finding that "...the record clearly demonstrates that market forces have revealed a desire among a significant number of television viewers for home shopping programming." Report at par. 27. It also specifically found that "...home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner." Id. at par. 28.

The Commission also reviewed the SKC Stations' submissions which demonstrated in detail their record of public service; it concluded that "...the chosen format of home shopping stations generally does not preclude them from adequately addressing the needs and interests of their communities of license." Id. at par. 32. Finally, the Commission found that the availability of home shopping formats had facilitated minority television station ownership and that "...minority-controlled licensees of home shopping stations enhance the diversity of views and information available to the public." Id. at par. 34.

CSC -- virtually the only party to oppose home shopping stations' must-carry status and the only entity to

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6/ Report and Order, MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ["Television Deregulation"], recon. denied, Memorandum Opinion and Order, 104 FCC 2d 358 (1986), aff'd in part and remanded in part sub. nom., Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

seek reconsideration of the Report[7/] -- submits nothing to indicate any error in the Report's conclusions. Instead, it simply repeats its earlier arguments which ask the Commission to reverse its public interest determination because of its totally unsubstantiated claim that the broadcast of commercial material conflicts with the public interest. CSC also asks the Commission to premise reconsideration on a judgment concerning the format in which home shopping stations' public affairs programming is presented. Such action is clearly barred by the First Amendment and Section 326 of the Communications Act of 1934, as amended.

CSC also raises questions concerning the procedural propriety of the Commission's decision, attacking Chairman Quello's concurrence as having been based upon impermissible ex parte communications from members of the public. (Ironically, CSC also complains about the Commission's failure to accord dispositive weight to a letter from Congressman Dingell, which was also submitted after the close of, and was not included within the proceeding's record.)

However, the majority of the letters to which CSC refers were in fact placed in the record. More

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7/ See FCC Public Notice, Report No. 1964 (September 9, 1993).

significantly, they were merely duplicative and particularized examples of general matters which were part of the record (and indeed are specifically referenced in the Commission's decision) and thus even if they could be considered ex parte, did not impermissibly taint the decision. Moreover, the issues with which those letters dealt involved but one minor and non-decisional aspect of the Report, and thus were immaterial to the rulemaking's resolution. CSC's ex parte claims thus do not affect the validity of the Commission's decision herein.

Finally, CSC objects to the Commission's conclusion at paragraph 36 of the Report that home shopping stations will not automatically be disqualified from receiving a renewal expectancy. This objection is curious, in that the Commission discussed this issue specifically in response to CSC's own comments. It is likewise contrary to Congress' express instructions.

CSC's petition, in short, presents no basis for the reconsideration which it requests.

CSC Does Not Demonstrate that Broadcast of Commercial Matter Disserves the Public Interest

CSC does not challenge the Commission's conclusions with respect to the three specific factors whose consideration is prescribed by Section 4(g), conclusions which formed the basis of its decision to accord home shopping stations status as "local" stations for must-carry

purposes. Instead, reflecting an emotional but still unsubstantiated dislike of broadcast commercial material, CSC collaterally attacks the Report by again[8/] in effect asking the Commission to reconsider its Television Deregulation decision to reimpose limits on the telecast of commercial matter.[9/] The Report properly rejected CSC's initial request that the Commission do so, and CSC's petition for reconsideration affords no basis to change that result.[10/]

8/ CSC continues to support this claim by reference to a colloquy involving Congressmen Dingell (not, as CSC erroneously states, Congressman Markey) and Eckart. However, as the principal sponsors of the Senate amendment which became Section 4(g) have noted, "...the House of Representatives had no hearings or debate on this matter [while] the Senate considered the issue extensively both in committee and on the Senate floor." Letter from Senator Bob Graham et al. to Chairman Quello, June 30, 1993. The Dingell-Eckart colloquy is but one small part of extensive legislative history. The controlling consideration is, however, the language of the statute itself. And that language does not compel or even permit the result CSC seeks.

9/ It should be noted in this regard that the Commission has recently instituted rulemaking proceedings to reevaluate the issue of television commercial limits. See Notice of Inquiry, MM Docket No. 93-254, FCC 93-459. That proceeding affords the appropriate forum for CSC to express its concerns, not this reconsideration proceeding.

10/ CSC claims at page 5 of its Petition that the Commission could not have foreseen that Television Deregulation would have resulted in adoption of home shopping formats. The Commission long ago rejected this assertion, noting that "HSN, with its unique programming fare, method of generating revenues, and operational approach, would appear to be the kind of innovative enterprise the Commission was encouraging in [Television

(continued...)

CSC's position rests upon its belief that the broadcast of commercial matter, standing alone, is necessarily contrary to the public interest. This claim, in turn, is premised upon rote reiteration of now-invalid decisions supporting limitations on the amount of commercial matter which stations may broadcast.[11/]

Significantly, neither those decisions nor CSC have ever even attempted any specific analysis, discussion or explanation of precisely why commercial matter is inconsistent with the public interest. What is inherently wrong, bad, or otherwise irreconcilable with the public interest about broadcast material which seeks to sell legal products or services? Why is it less consistent with the public interest for a station to air 55-1/2 minutes of commercial material in an hour than 55-1/2 minutes of a violent movie like "Rambo," an afternoon soap opera, a game show which urges contestants to win product prizes, or a

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10/ (...continued)
Deregulation]." Home Shopping [Network] [sic], Inc., 4 FCC Rcd 2422, 2423 (1989).

11/ CSC's reliance on concerns with commercialization which existed many years ago fails to reflect the changing standards applicable to broadcast programming. Much material now routinely available on the air would not have been acceptable twenty years ago. Similarly, the broadcast of commercial matter at a time when broadcasting was still relatively new and operated in a far less competitive atmosphere involved different societal values than exist today when advertising is virtually universal in its media presence.

talk show on sexually-oriented topics like "Geraldo?" What in the First Amendment would permit the Commission to determine that presentation of "Days of Our Lives," "Oprah Winfrey," "Heavyweight Wrestling" and "G.I. Joe" is more consistent with the public interest than presentation of HSN programming? How would such a determination be made or justified?

CSC has never answered these questions. It has never cited any studies which demonstrate adverse effects associated with the airing of commercial material to adults. In the case of violent programming, where there is substantial evidence of adverse societal consequences,[12/] Congress has hesitated to engage in outright program regulation or restriction because of First Amendment concerns.[13/] SKC respectfully submits that there should be even greater hesitation -- in fact, complete forbearance -- in the case of regulation of legitimate commercial material where there is absolutely no concrete evidence of adverse societal impact associated with its broadcast.

12/ See, e.g., "Violence on Television," Hearing before the Subcomm. on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (December 15, 1992).

13/ See, e.g., H.R. 2159, 103rd Cong., 1st Sess. (May 19, 1993).

The Commission Cannot Promise a Decision on the Format of Stations' Public Affairs Programs

CSC's principal substantive objection to the decision rests on its claim that the 4-1/2 minute format of much of home shopping stations' public service programming[14/] does not serve the public interest. Significantly, CSC does not challenge SKC's uncontroverted demonstration that the amount of public service programming its stations air exceeds the only quantitative programming guidelines the Commission has adopted as well as the public service programming offered by the vast majority of other UHF stations in the SKC Stations' markets. Its only quarrel is with the format of that programming.

The Commission may not accept CSC's invitation to regulate program content. It is hornbook law that the Commission cannot become involved in decisions concerning matters such as stations' programming formats,[15/] and CSC's objections to the effectiveness of the SKC Stations' public

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14/ As the record reflects, home shopping stations also present more traditional long-form public service programming.

15/ See, e.g., FCC v. WNCN Listeners' Guild, 450 U.S. 582 (1981); WGBH Educational Foundation, 69 FCC 2d 1250 (1978); WPIX, Inc., 68 FCC 2d 381 (1978); Multi-Com, Inc., 72 FCC 2d 198 (1979); Kaye-Smith Enterprises, 71 FCC 2d 1402 (1979).

service programming based solely upon its length[16/] thus afford no basis for reconsideration of the Report.

The Commission was Under No Obligation To Consider Formats Involving Less Home Shopping Programming

CSC also criticizes the Commission for failing to consider whether the benefits of home shopping formats (which CSC at last apparently concedes) could still be achieved if stations aired less home shopping programming.[17/] This objection, however, fails to note that the Commission's decision principally relies on its findings as to Section 4(g)'s three specific criteria; the agency's ancillary finding of benefits afforded additional support for its decision but was not determinative of the ultimate result.

In any event, there was and is no requirement that, having determined that home shopping stations' current format permits satisfaction of public interest obligations, the Commission also consider whether alternative formats might also do so. The Commission found that Section 4(g)'s

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16/ The difficulties inherent in the distinctions CSC asks the Commission to draw are illustrated by CSC's own failure to suggest what length of public service programming might be effective. CSC likewise fails to suggest a constitutional justification for this type of content regulation.

17/ CSC does not suggest what level of programming might accomplish this goal or how the Commission would make such a determination.

three factors supported must-carry rights for home shopping stations. It found that home shopping stations are serving the public interest through public service programming, the principal component of stations' public interest obligations. That it also acknowledged ancillary minority and related ownership benefits in addition to these findings does not require any determination that similar benefits could have been achieved under different program formats. The issue on which CSC requests reconsideration was not a decisional issue herein.

The Decision Is Not Invalidated by Ex Parte Communications

CSC also charges that Chairman Quello's vote was based on impermissible ex parte communications. This assertion, in turn, is premised upon the references in Chairman Quello's Separate Statement[18/] to a number of letters from members of the public which "...urged us to find that home shopping stations serve the public interest in the same way as broadcasters with more traditional formats -- by providing information vital to their communities."[19/] In that regard, the letters simply amplify

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18/ These letters were also mentioned in Commissioner Duggan's Dissenting Statement.

19/ Half of the referenced letters were in fact placed in the record on June 29, 1993, identified as ex parte communications. It should be noted that CSC also filed an ex parte communication on June 30, 1993.

information which was already in the record in formal comment submissions[20/] to which CSC had ample opportunity to, and did, reply.

Chairman Quello also quotes several individual letters which gave specific examples of the way in which home shopping stations assist persons with disabilities and the elderly and afford alternatives to cable home shopping services. Again, those letters merely duplicate or particularize claims already in the record from other parties.[21/] CSC thus had notice of and the opportunity to address them (it did not, see Report, par. 28).

In short, Chairman Quello's references to letters received from members of the public did no more than indicate the existence of additional material which merely supported information which was already in the record and which could have been addressed by the parties. CSC's claims

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20/ See, e.g., the Comments of the various Silver King Communications, Inc. owned and operated stations; Comments of HSN.

21/ See, e.g., Report, paragraph 28, no. 84 ["Several commenters state that they provide valuable services to the disabled and others confined to their homes, the elderly, families without time to shop by other means, people without ready access to retail outlets or whose outlets do not stock the goods they want, people without cars or other transportation, people who dislike shopping and people who are afraid of violent crime in conventional shopping areas."]; pars. 16, et seq. Finally, a number of the letters submitted in the docketed ex parte communications referred to above also confirmed these claims. See, e.g., Letters from Harold V. Bratt; "T.H.J.;" Belle R. Mest; Mrs. James Reed.

of impermissible ex parte influence afford no basis for reconsideration.

The Dingell Letter Is Not Controlling

CSC's final claim for reconsideration is based on its assertion that Chairman Dingell's June 22, 1993, letter to Chairman Quello should have controlled the Commission's decision.[22/] That letter, written post-enactment by a single, albeit important and influential, Congressman, is but one part of the voluminous and often conflicting legislative history of the 1992 Cable Act in general and Section 4(g), in particular. It is well established, however, that the Commission has wide latitude in interpreting its statutory mandate, and that in the absence of a gross abuse of discretion or disregard for specific statutory language, that latitude is accorded significant deference.[23/] Further, while legislative history may afford some guidance as to Congressional intent, a single

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22/ CSC cites no authority for its apparent belief that every communication from Congress must be specifically considered in Commission rulemaking decisions. It should be noted that Chairman Dingell's interpretation of the statute -- that urged by CSC -- was in fact considered but rejected by the Commission.

23/ See, e.g., Orange Park Florida TV, Inc. v. FCC, 811 F.2d 664 (D.C. Cir. 1987); City of New York Municipal Broadcasting System v. FCC, 744 F. 2d 827 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084; National Railroad Passenger Corp. v. Boston and Maine Corp., 112 S. Ct. 1394 (1992); Rivera-Cruz v. INS, 948 F.2d 962, reh. denied, 954 F.2d 723 (5th Cir. 1991).

post-enactment letter does not constitute controlling interpretative material.[24/] Indeed, other members of Congress, concluding Congressman Towns, Congressman Hughes, Congresswoman Brown, also submitted letters reflecting different views of Congressional intent.[25/] There are, in short, divergent Congressional views of the legislation. And it is the Commission's role to finally interpret those views.

CSC makes no showing that the Commission's decision offends the Cable Act's statutory language or otherwise represents an abuse of the Commission's interpretative discretion. Chairman Dingell's position is but one of many possible interpretations of the legislation and was considered by the Commission (albeit not with specific reference to his letter); it need not be the only one.

24/ See, e.g., Sutherland on Statutory Construction (5th ed., 1992) § 48.10 ["...committee statements made after the statute has been passed cannot retroactively provide legislative history or an interpretation contrary to the intent at the time of enactment."]; § 48.16 ["...postenactment statements made by a legislator as to legislative intent do not become part of the legislative history of the original enactment."].

25/ CSC makes no showing why the FCC should ignore these equally valid Congressional views.

There is No Reason to Alter the Commission's Statement Concerning Home Shopping Stations' Entitlement to a Renewal Expectancy

CSC, finally, asks the Commission to withdraw its holding that home shopping stations will not be denied a renewal expectancy because of their home shopping format. Astoundingly, it makes this request even though the statement in question was issued in response to its own argument. In short, its position having been rejected by the Commission, CSC now wants the Commission to delete that rejection from the record.

CSC's request was and is flatly contradicted by the language of the Cable Act, which indicates that the Commission "...shall not deny such [home shopping] stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials." The Commission's rejection of CSC's claims merely held that the statute means what it says.

Conclusion

CSC's Petition for Reconsideration simply continues its unsupported campaign against stations having a home shopping format. It presents absolutely no basis for a change in the rules adopted by the Report.

Silver King Communications, Inc. therefore respectfully requests the Commission to affirm its Report

and Order herein in all respects and to dismiss CSC's petition for reconsideration.

Respectfully submitted,

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September 30, 1993

CERTIFICATE OF SERVICE

This will certify that a complete copy of the foregoing "Opposition to Petition for Reconsideration" was sent this 30th day of September, 1993, via first class United States mail, postage prepaid, to the following:

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September 30, 1993